Supreme Court, U.S.
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No. 88-1186

In The
Supreme Court of the United States
October Term,-1988

CUDAHY COMPANY and GENERAL HOST CORPORATION,

Petitioners,

v.

CECIL W. MILLER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. PETITIONERS' CONSTITUTIONAL CLAIMS WERE NOT PROPERLY PRESENTED TO THE COURTS BELOW AND ARE NOT PROPERLY BEFORE THIS COURT. 4

II. NO SUBSTANTIAL CONSTITUTIONAL QUESTIONS EXIST WITH RESPECT TO THE PUNITIVE DAMAGES AWARD IN THIS CASE, WHERE THE TRIAL COURT'S FINDINGS OF FACT WERE "AMPLY" SUPPORTED BY THE RECORD; THE RATIO BETWEEN PUNITIVE AND ACTUAL DAMAGES WAS NOT ARBITRARY OR EXCESSIVE; THE PUNITIVE DAMAGES WERE IMPOSED BY THE DISTRICT JUDGE, NOT A JURY; AND THE DUE PROCESS RIGHTS OF DEFENDANTS WERE AMPLY PROTECTED. 6

III. PETITIONERS' CONSTITUTIONAL ARGUMENTS AGAINST THE ACTUAL DAMAGES AWARD ARE TRANSPARENTLY MERITLESS. 8

IV. TO HOLD DEFENDANTS' CERTIORARI PETITION PENDING THE COURT'S DISPOSITION OF *BROWNING-FERRIS* WOULD BE INAPPROPRIATE, SINCE a) *BROWNING-FERRIS* IS INAPPOSITE ON ITS FACTS AND b) FURTHER DELAY IN THIS TWELVE-YEAR LITIGATION WOULD UNFAIRLY PREJUDICE THE PLAINTIFFS AND REWARD DEFENDANTS' TACTICS OF DELAY. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 845 F.2d 404 (2d Cir. 1988) *cert. granted* No. 88-556 ..... 9, 10

Hoover v. Ronwin, 466 U.S. 558, 80 L.Ed.2d 590, 104 S. Ct. 1989 (1984) 6

Kline v. Multi-Media Cablevision, Inc., 233 Kan. 988, 666 P.2d 711 (1983) 7

Mircc v. DeKalb County, 433 U.S. 25, 53 L. Ed. 2d 557, 97 S. Ct. 2490 (1977) 6

Newman v. Nelson, 350 F.2d 602 (10th Cir. 1965) 1

STATUTES AND RULES

15 U.S.C.A. § 15 7

Fed. R. Civ. P. 52(a) 9

STATEMENT OF THE CASE

In this diversity action, the twenty-nine plaintiff farmers were awarded over three million dollars in lost crop profits for the period 1975-1983, and defendants were assessed ten million dollars in punitive damages, after plaintiffs proved that their groundwater had been maliciously, wantonly, and persistently polluted by defendants' salt mine near Lyons, Kansas (App. at 2, 117, 169-172, 176),[1] which continued to pollute "up to the present time." (App. at 137) After a thirty-three day bench trial (*i.e.*, actual trial days), the District Court issued a lengthy Opinion and Order containing no less than one hundred fifty-seven separate findings of fact concerning plaintiffs' actual and punitive damages claims. (App. at 117, 118-165)

The Court of Appeals, having thoroughly examined the entire record, found that "the district court's comprehensive factual findings . . . are amply supported by the record." (App. at 3)

The District Court's factual basis for imposing punitive damage is found at pages 145 to 154 of the Appendix (Factual Findings 109-129). In affirming the trial court's decision, the Court of Appeals held that

> the award of punitive damages is clearly supported by the evidence. . . . It is readily apparent that appellants created the nuisance and "persistently maintain[ed] it with a reckless disregard for the rights of others." *Newman v. Nelson*, 350 F.2d 602, 604-05 (10th Cir. 1965). Appellants' conduct was deliberate,

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1. "App." refers to defendants' "Appendix to Petition for a Writ of Certiorari," etc.

> with full knowledge of the consequences and with a marked indifference thereto.

(App. at 16)

For example, when faced with pollution complaints from its neighbors and from the responsible regulatory agency (the Kansas Department of Health and Environment [KDHE]), American Salt responded with defiance, intimidation or deceit. (App. at 150, 162-165) American Salt deliberately polluted in violation of the law, cavalierly accepting a fine when this was the cheapest and most profitable way to do business. (App. at 148-150) When plaintiff Cecil Miller threatened to sue American Salt, its president, Otto Rueschhoff,

> dared Miller to file suit and boasted that the money and lawyers available to American Salt would enable it to drag any litigation out for years, bankrupt Miller in the process, and take his land from him.

(App. at 150) After KDHE ordered the salt plant to hire an independent engineering firm to assess its ongoing pollution problems, American Salt falsified the "independent" report by purging it of much evidence of serious ongoing pollution. (App. at 162-165)

The District Court found as fact that General Host, the parent corporation, far from being an ordinary, passive shareholder, involved itself actively in the management of the American Salt plant and bore direct responsibility for the ongoing pollution. The salt plant's reprehensibly lax maintenance practices were due in part to General Host's demands for "constantly increasing prof-

its." (App. at 151)[2] General Host was deeply involved in the salt plant's actual management and in the decisions on how to deal (or fail to deal) with the pollution problem. (App. at 151-154) As the District Court found,

> [b]y virtue of its actual notice of the pollution occurring at American Salt's plant, its refusal to take steps to correct that pollution, and its active participation in the management affairs of American Salt, General Host effectively ratified [the] past acts [of American Salt's president] and authorized him to continue to operate the plant in the same manner in the future, despite the fact that his complete indifference to and reckless disregard of the environment and the rights of the adjacent landowners made him unfit to direct the policy and activities of the corporation.

(App. at 153)

The court therefore found that punitive damages in the amount of ten million dollars were warranted and that

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2. In assessing punitive damages, the District Court found as fact that:

   a) American Salt's consistent corporate philosophy was to maximize profits while minimizing any expenses not related to increased production and profits;

   b) Despite being aware of the grievous environmental dangers of salt-solution mining, American Salt's management reached a conscious and reasoned business decision to maximize profits at the expense of required preventive maintenance of their complex physical plant and equipment;

   c) The record was "rife" with pollution caused by deterioration of the salt company's physical plant and equipment; and

   d) Corners were cut even when major repairs or additions to the plant were in fact undertaken.

   (App. at 145-146)

the assessments must be imposed against both General Host and its subsidiary. (App. at 153-154)

The District Court also found and concluded that, under Kansas law, plaintiffs should recover the crop profits which they had lost from 1975 to 1983 through their inability to irrigate because of the groundwater pollution caused by defendants (App. at 138-142, 168-169), who still continued to pollute "up to the present time." (App. at 125-138)

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REASONS FOR DENYING THE WRIT

I. PETITIONERS' CONSTITUTIONAL CLAIMS WERE NOT PROPERLY PRESENTED TO THE COURTS BELOW AND ARE NOT PROPERLY BEFORE THIS COURT.

Defendants' failures in the courts below to raise the constitutional issues now presented preclude certiorari.

Defendants' *only* attempt *ever* to raise a "constitutional" issue before the District Court occurred one and one-half years after the District Court's "Opinion and Order" awarding actual and punitive damages. The gist of this vague, passing "argument" was that defendants were constitutionally entitled to an evidentiary hearing on their Motion for New Trial on "newly discovered evidence" grounds, because punitive damages were "essentially criminal." (2/10/86, Defendants' Memorandum in

Support of Motion for Oral Argument, etc., pp. 6-7) This argument has not appeared since.[3]

The procedural argument presented to the District Court, *i.e.*, that an evidentiary hearing on their new trial motion was constitutionally required (even after thirty-three actual trial days!), failed to preserve any of the defendants' current constitutional issues, which sweepingly attack the actual and punitive damages on the merits.

Hence, defendants' present "constitutional" arguments were never raised before the District Court at all. Even on appeal, the "constitutional" arguments on punitive damages were argued only perfunctorily. Apparently such arguments were included only to create a "federal" issue to use in seeking certiorari.

Defendants' other "constitutional argument," *i.e.*, the novel contention that the actual-damages award was unconstitutional, was first raised when defendants petitioned the Tenth Circuit for rehearing.

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3. In discussing the argument, the District Court said:

> [t]o suggest that this Court has not afforded defendants a meaningful opportunity to be heard is laughable. In addition to a very lengthy trial, numerous hearings have been held in this matter, some of them as long as a normal trial. At each of these hearings defendants have been given full opportunity to present evidence and to examine plaintiffs' evidence. . . . The Court has noted at some of these hearings that, if anything, this case was being "due processed to death." For the defendants to suggest now, after ten years of activity, months of trial time, and volumes of pleadings that due process is being denied them is perhaps one of the most outlandish claims this Court has ever heard.

(App. at 58-59)

All defendants' arguments therefore come so late as to preclude review by this court. *Hoover v. Ronwin*,, 466 U.S. 558, 574, n. 25, 80 L. Ed. 2d 590, 104 S. Ct. 1989 (1984) (Supreme Court will not consider argument raised for first time in response to rehearing motion before Court of Appeals); *Mirce v. DeKalb County*, 433 U.S. 25, 53 L. Ed. 2d 557, 97 S. Ct. 2490 (1977) (issue neither pleaded, argued, nor briefed in lower courts will not be considered by U.S. Supreme Court).

II. NO SUBSTANTIAL CONSTITUTIONAL QUESTIONS EXIST WITH RESPECT TO THE PUNITIVE DAMAGES AWARD IN THIS CASE, WHERE THE TRIAL COURT'S FINDINGS OF FACT WERE "AMPLY" SUPPORTED BY THE RECORD; THE RATIO BETWEEN PUNITIVE AND ACTUAL DAMAGES WAS NOT ARBITRARY OR EXCESSIVE; THE PUNITIVE DAMAGES WERE IMPOSED BY THE DISTRICT JUDGE, NOT A JURY; AND THE DUE PROCESS RIGHTS OF DEFENDANTS WERE AMPLY PROTECTED.

The district judge, whose factual findings were "amply" supported by the record, concluded that the salt plant's management had wantonly shown "a reckless disregard for the rights of others" and had acted maliciously, *i.e.*, had intentionally performed wrongful and injurious acts with full knowledge of their character and without cause or excuse. (App. at 170-171) The Court of Appeals affirmed these findings *in toto*. (App. at 16)

The imposition of punitive damages upon defendants was not the product of "uncontrolled" jury discretion. Rather, it was the product of the informed, intelligent discretion of a federal district judge, sitting as finder of

fact and rendering conclusions of law pursuant to definite Kansas standards, App. at 170-171. *See inter alia Kline v. Multi-Media Cablevision, Inc.*, 233 Kan. 988, 989, 666 P.2d 711 (1983). The definitions of "wanton" and "malicious" conduct applied by the district judge here are no more "vague" or "arbitrary" than are similar standards universally recognized and applied in both civil and criminal cases.

Further, the ratio between actual and punitive damages here is only approximately 1:3, and thus no more arbitrary or excessive than, for example, the treble-damages provisions of the antitrust laws, 15 U.S.C.A. § 15, which are clearly constitutional.

As the District Court noted, defendants cannot with a straight face claim that their "due process" rights were violated, *i.e.*, that they were not given a meaningful opportunity to be heard before the District Court. In fact, the case was almost "due processed to death." (App. at 58-59)

Thus, in this bench trial, where the Court of Appeals held that the trial court's findings, conclusions, and judgment were amply supported, where Kansas standards for the imposition of punitive damages are quite clear, where no constitutional questions about the 1:3 ratio between actual and punitive damages for the ongoing pollution can reasonably be raised, and where the defendants' due-process rights were more than amply protected, there simply are no constitutional issues for this court to inquire into.

III. PETITIONERS' CONSTITUTIONAL ARGUMENTS AGAINST THE ACTUAL DAMAGES AWARD ARE TRANSPARENTLY MERITLESS.

For the very first time on petition for rehearing before the Tenth Circuit, defendants suggested a) that an award of actual damages against a tortfeasor, to compensate the plaintiff for an injury done by that tortfeasor, is a "taking of property for public use" for which the tortfeasor is entitled to just compensation, and b) that the courts are not constitutionally permitted to compensate fully an injured property owner for loss of profits caused by ongoing pollution which continues "up to the present time." (App. at 137) In other words, defendants argue that, once they have paid damages equal to the value of the land, they acquire a *prescriptive* right to pollute without paying further damages, and that they hold this right *by virtue of the Constitution of the United States!* They thus assert that the "takings" clause a) gives them the constitutional right to condemn their neighbors' properties to their own use and b) further sets a limit on how much they will have to pay. Merely to state these arguments is to make manifest their absurdity. The courts below fairly compensated the twenty-nine plaintiff farmers for their actual damages for ongoing pollution, *i.e.*, lost crop profits, without in any way offending the Constitution of the United States.

IV. TO HOLD DEFENDANTS' CERTIORARI PETITION PENDING THE COURT'S DISPOSITION OF BROWNING-FERRIS WOULD BE INAPPROPRIATE, SINCE a) BROWNING-FERRIS IS INAPPOSITE ON ITS FACTS AND b) FURTHER DELAY IN THIS TWELVE-YEAR LITIGATION WOULD UNFAIRLY PREJUDICE THE PLAINTIFFS AND REWARD DEFENDANTS' TACTICS OF DELAY.

To hold the certiorari petition pending resolution of the *Browning-Ferris* case would serve no purpose, since the two cases are factually dissimilar. *Browning-Ferris* involved a ratio of actual to punitive damages of *over 1:100. Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 845 F.2d 404, 406-407 (2d Cir. 1988), *cert. granted*, No. 88-556 (Dec. 5, 1988). The comparable ratio in the instant case is only 1:3 and cannot be called arbitrary or excessive. Further, whereas in *Browning-Ferris* the punitive damages were entered on a general jury verdict, *Id.* at 406-407, the punitive damages in the instant case were entered following a lengthy bench trial by a federal district judge, who assessed punitive damages against an ongoing polluter based on twenty-one specific factual findings under Fed. R. Civ. P. 52(a). The two cases simply are not comparable.

Further, any more delay in the disposition of this case would be unfairly prejudicial to the plaintiffs. As the trial court found, the defendants boasted even before this suit was filed that they would win by tactics of attrition.

> When he was personally confronted by angry landowners, Rueschhoff [American Salt's president] preferred to employ a strategy of intimidation. . . .

> [W]hen [plaintiff] Cecil Miller finally threatened legal action against American Salt, Rueschhoff dared Miller to file suit and boasted that the money and lawyers available to American Salt would enable it to drag any litigation out for years, bankrupt Miller in the process, and take his land from him. It appears that at least the first part of this boast was not an idle one.

(App. at 150)

So far, defendants have succeeded in dragging out the litigation for almost twelve years. In asking this court to hold their certiorari petition pending the outcome of the *Browning-Ferris* case, defendants seek yet further delays. Plaintiffs respectfully submit that for the court to accommodate defendants in this respect would be unconscionable. It has been *almost twelve years* since suit was filed. In that time, a number of the plaintiffs have died. As the District Court ruefully noted, there is a growing resemblance between this case and the futile, interminable *Jarndyce v. Jarndyce* suit of *Bleak House*: despite over a decade of litigation, the twenty-nine plaintiff farmers have yet to see a penny in compensation for the millions of dollars in losses they have suffered because of defendants' ongoing pollution. Defendants' request that their certiorari petition be held, pending disposition of *Browning-Ferris*, should be denied.

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CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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